of the principal sum. Even where the gift includes the whole interest, it is possible to make the interest and the principal the subject of distinct legacies, and such would seem to be the presumption where the interest is to be accumulated and paid simultaneously with the principal sum.[11]. In such cases, obviously, the provision as to interest can have no effect on the vesting of the legacy.

Where the devise is to a class of persons, it becomes important to distinguish between a gift to a contingent class and a gift to a class on contingency. Thus, in a gift to "those children who attain twenty-one", it seems obvious that the testator intended to include only those who answer that description and a gift of interest will not, therefore, affect the vesting of the legacy.[12] Where, on the other hand, the gift is to children "when they attain twenty-one",[13] a gift of interest seems as indicative of the testator's intent to make a present bequest as if it were a gift to a single individual. In such cases, however, if the interest on the aggregate sum is to be applied indiscriminately for the maintenance of the whole class such a provision can have no effect on the vesting of any particular share for it cannot be said that interest has been given on that share.[14] But where the income of each presumptive share is to be paid to its prospective holder, the case is precisely as if it were a gift to a single individual and such a provision will have the effect of immediately vesting the legacy.[15]

Some courts have observed the distinction between a direct gift of interest and a gift of maintenance.[16] This distinction is based on the fact that where maintenance only is given the legatee can call for no more than is necessary for that purpose, which may not amount to the whole interest.[17] In so far as this is the fact, the distinction seems sound, but where maintenance is given the question arises whether it is a distinct gift or merely a direction as to the application of the interest. If the former, it can, of course, have no effect on the vesting of the legacy; if the latter, it should have the same effect as a direct gift provided the whole interest is included,[18] for it is the fact that the whole income has been bequeathed,[19] rather than the use to which it is to be applied, which indicates the testator's intent to make a present gift of the principal sum.

DISCRIMINATION IN CONNECTION WITH PRIVATE FREIGHT CARS.—The use of private or individual freight cars has given rise to various questions in recent decisions. In the case of private oil tank cars, the question has arisen concerning the proper allowance in rates to be made a shipper who supplies his own cars. That a reasonable rental

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[11]Lock *v.* Lamb (1867) L. R. 4 Eq. 372.

[12]*In re* Ashmore's Trusts (1869) L. R. 9 Eq. 99; Bull *v.* Pritchard (1826) 1 Russ. 213.

[13]Hansom *v.* Graham *supra.*

[14]*In re* Parker (1880) L. R. 16 Ch. Div. 44; *In re* Gosling [1902] 1 Ch. 945.

[15]*In re* Turney L. R. [1899] 2 Ch. 739.

[16]Pulsford *v.* Hunter (1792) 3 B. C. C. 416.

[17]Hansom *v.* Graham *supra.*

[18]Watson *v.* Hayes *supra.*

[19]Warner *v.* Durant (1870) 76 N. Y. 133.

may be allowed for the use of the car, is well settled.[1] Since the carrier does not ordinarily furnish tank cars, however, the further question arises whether any other preference may be shown shippers who furnish their own cars. The courts have refused to sanction such a preference.[2] Where a shipper supplies private coal cars, a different problem is presented. In the case of car shortage, the carrier, in making a *pro rata* distribution of its coal cars must consider the private coal cars on its line as part of its available equipment, and, while a shipper is entitled to the exclusive use of his own cars, he must count them as part of his share in the distribution.[3] In accord with this holding is the recent case of *Chicago & A. R. R. Co.* v. *Interst. C. C.* (C. C., N. D. Ill., E. D. 1908) 173 Fed. 930.

Upon principle, these decisions would seem to be open to criticism. Discrimination, under the better modern rule, is illegal when not based on substantial difference in conditions of shipment, or service rendered.[4] But a shipper who supplies freight in carload lots is entitled to a preference in rates, because his consignments are more easily handled than freight in less than carload quantities.[5] So also allowance may properly be made in favor of a shipper who provides terminal facilities.[6] But in the tank car cases, deduction is permitted only in the form of a rental charge for the cars; no allowance is made on the ground that tank car shipments are more economically handled than barrels in car load lots.

The reasons for this holding would seem to be based in large measure on the consideration of actual economic conditions. Carriers do not ordinarily furnish tank cars. The Interstate Commerce Commission, conceding the duty to provide tank cars, finds itself without power to enforce performance of the duty.[7] But state courts, though hampered by no such jurisdictional restriction, have refused to allow a difference in rate, apparently disregarding the duty to supply tank cars.[8] The expense of providing tank cars is such that only large shippers can profitably supply them. Thus, the smaller shipper has no choice; he must ship in barrels. Experience shows that a difference in rates based on the use of private tank cars works great hardship to the smaller shipper, and indeed makes competition impracticable. The argument based upon the analogy of the difference in rates on the shipments in carload lots and less quantities, already

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[1] See State *ex rel. v.* C., N. O. & T. P. Ry. Co. (1890) 47 Oh. St. 130, 139.

[2] State *ex rel. v.* C., N. O. & T. P. Ry. Co. *supra;* Scofield *v.* Lake Shore & M. S. Ry. (1888) 2 I. C. C. Rep. 90. 109, 111, 115; Rice *v.* Louisville & Nashville R. R. Co. (1888) 1 I. C. C. Rep. 503, 530, 540-548; Rice *v.* Western N. Y. etc. Co. (1890) 4 I. C. C. Rep. 131, 149.

[3] 8 COLUMBIA LAW REVIEW 592; U. S. *ex rel.* Coffman *v.* Norfolk etc. Ry. Co. (1901) 109 Fed. 831, 837; U. S. *v.* Balt. & O. R. R. Co. (1907) 154 Fed. 108, 113. *Dicta* indicate that the owners are also entitled to the exclusive use of private tank cars. See State *ex rel. v.* C., N. O. & T. P. Ry. Co. *supra.*

[4] Messenger *v.* Penn. R. R. Co. (1873) 36 N. J. L. 407; Scofield *v.* Ry. Co. (1885) 43 Oh. St. 571, 600. But see Fitchburg R. R. Co. *v.* Gage (Mass. 1859) 12 Gray 393, 399.

[5] See Scofield *v.* Lake Shore & M. & S. Ry. *supra.*

[6] Root *v.* Long Island R. R. (1889) 114 N. Y. 300.

[7] Scofield *v.* Lake Shore & M. S. Ry. (1888) 2 I. C. C. Rep. 90, 116.

[8] State *ex rel. v.* C., N. O. & T. P. Ry. Co. *supra.*

noted, is rejected. In answer, the courts point out the duty of the carrier to supply tank cars, and lay stress upon the disastrous effect upon the small shipper of a similar difference in rates in favor of the shipper who supplies his own tank cars. Thus, the reason for the distinction would seem to be the economic effect of a difference in rates.

The same considerations, it would seem, have governed in the decisions relating to private coal cars. Private cars must be counted as part of the available equipment of the carrier because a contrary rule would place difficulty in the way of the smaller shippers. Since the private cars make demands upon the carrier's operating force and equipment, it is argued that it is but just that they be counted a part of the carrier's rolling-stock. Carried to its logical conclusion, this argument would require that private freight cars be available to all shippers indiscriminately; but the actual decisions hold that the owner is entitled to the exclusive use of his private cars. That the effect upon the competition of smaller shippers is a potent consideration, is evident from the holding that cars of other railroads upon the carrier's lines need not be counted in a *pro rata* distribution, since they were few, and no damage to the shipper was shown.[9]

Apparently, therefore, considerations of justice between shippers, and of public policy in the preservation of competition,[10] rather than the strict application of the principles of the law of common carriage, underlie the decisions in the private car cases.

[9]U. S. *v.* Balt. & O. R. R. Co. (1907) 154 Fed. 108, 117.

[10]Compare the reasoning in Scofield *v.* Ry. Co. (1885) 43 Oh. St. 571, 600, 609.